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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 722

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE LOYAL BAND OR GROUP OF CREEK INDIANS, AND THE LOYAL CREEK CLAIMANTS' COMMITTEE, ON THE RELATION OF JOSEPH BRUNER, S. W. BROWN, JESSE MCDERMOTT, LASLEY HAYNES, BEN JOHNSON, ROBERT SEVERS, HOSA HOLLEY, NOLEY BUCK, JOHN H. JONES, ELMER HILL, THOMPSON KING, AND SEBORN SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 6, 1951.

OPINIONS BELOW

The opinions of the Indian Claims Commission (R. 21-29, 102-110) are not reported. The opinion of the Court of Claims (R. 118-126) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered February 6, 1951 (R. 126). The jurisdiction of this Court rests upon 28 U. S. C. 1255.[1]

QUESTIONS PRESENTED

1. Whether jurisdiction is lacking under the Indian Claims Commission Act for this suit because (a) the claim is not that of a "tribe, band, or other identifiable group of American Indians" and (b) it is an aggregate of individual claims rather than a common claim.

2. Whether the Senate finally determined the amount of the claims of the loyal Creek Indians at $600,000 as it expressly stated or whether, because of an initial vote of the Senate for $1,200,000 in the process of that enactment, an indebtedness of an additional $600,000 remains.

3. Whether the releases required by Congress and executed by the Creek Nation and the indi-

[1] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s, provides in section 20(c) that determinations of questions of law by the Court of Claims shall be subject to review by this Court in the manner prescribed by section 3 of the Act of February 13, 1925, which now has been superseded by 28 U.S.C. 1255. Since the Act makes no provision as to the time for filing a petition for certiorari, the general provisions of 28 U. S. C. 350 (1946 ed.) would appear to be applicable.

vidual Indians, accepting $600,000 in full settlement, finally disposed of the claims.

STATUTES INVOLVED

Section 26 of the Act of March 1, 1901, 31 Stat. 861, 869, provides:

> All claims of whatsoever nature, including the "Loyal Creek claim" under Article Four of the treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under Article Twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.
>
> Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States Government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.
>
> Any other claim which the Creek Nation may have against the United States may be

> prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts.

The relevant portion of the Indian Appropriation Act of March 3, 1903, 32 Stat. 982, 994-995, provides:

> In pursuance of the provisions of section twenty-six of an Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March first, nineteen hundred and one, there is hereby awarded, as a final determination thereof, on the so-called "loyal Creek claims" named in said section twenty-six, the sum of six hundred thousand dollars, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the loyal Creek Indians and freedmen named in articles three and four of the treaty with the Creek Nation of Indians of June fourteenth, eighteen hundred and sixty-six, the said sum of six hundred thousand dollars, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said articles three

> and four; and such payments shall be made in proportion of the awards as set out in said list: *Provided,* That said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said loyal Creek claims, and the payment thereof shall be a full release of the Government from any such claim or claims * * *.

The relevant portion of section 2 and section 13(a) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 1052, 25 U.S.C. 70 (a) and 70 (l) provide:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United

States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

Sec. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

STATEMENT

In this action the descendants of 1,523 Creek Indians who were loyal to the United States during

the Civil War seek compensation under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70(a)-70(w), for property lost or destroyed in that war. The Indian Claims Commission denied recovery. The Court of Claims awarded $600,000. The facts are as follows:

During the Civil War, the Creek Nation aligned itself by treaty with the Confederate States of America. Several thousand individuals of the Creek Nation, however, remained loyal to the United States. These were driven from the reservation. The personal property and improvements on the lands of many of them were taken or destroyed. At the end of the war, the United States and the Creek Nation concluded a treaty on June 14, 1866, 14 Stat. 785, pursuant to which a roll of the loyal Creek Indians was made showing the losses of individuals and $100,000 was paid to them out of Creek tribal funds in proportion to their individual losses.

By Act of March 1, 1901, 31 Stat. 861, *supra*, pp. 3-4, Congress approved an agreement with the Creek Nation wherein, among other things, it was provided that the claims of the loyal Creek Indians should be submitted to the Senate of the United States for final determination. Pursuant thereto, the claims were submitted and the Senate referred them to its Committee on Indian Affairs. On February 16, 1903, the Committee reported out an Indian Appropriation Bill which had originated in

the House (H.R. 15804), with several amendments, and recommended its passage. Included among the amendments was an addition to the House bill of $1,200,000 for the loyal Creek claims, pursuant to the Act of March 1, 1901. 36 Cong. Rec. 2252.

The Senate passed the Indian Appropriation Bill as so amended. 36 Cong. Rec. 2255. The House refused to concur in the Senate amendment. A Conference Committee was appointed which agreed upon a reduction of the amount to $600,000. It also inserted a proviso in the text of the bill that the said sum shall be accepted in full payment and release of all such claims. 36 Cong. Rec. 2626.

The report of the Conference Committee was agreed to by both the Senate (36 Cong. Rec. 2627) and the House (36 Cong. Rec. 2770) and the bill, as thus amended, became the Act of March 3, 1903, 32 Stat. 982, *supra,* pp. 4-5.

On May 23, 1903, the National Council of the Creek Nation adopted a resolution, approved by the President of the United States as required by law, accepting the $600,000 in full satisfaction and release "of all claims and demands growing out of said Loyal Creek claims" (R. 83-84). Thereafter, the $600,000 (less $90,000 paid the attorneys) was paid to the 4,506 claimants, then existing, by March 1905 in proportion to the individual losses. Each claimant signed a statement accepting the sum received in "full and complete settlement" for property lost during the Civil War (R. 88a).

In December 1946, the respondents instituted this action in the Indian Claims Commission. Contending that the first vote of the Senate granting the loyal Creek Indians $1,200,000 was final, they sought the unpaid $600,000 and also the $90,000 withheld from the previous payment for attorneys' fees, together with interest on both sums at 5 per cent from July 1, 1903, to January 1, 1947, in the sum of $1,500,750, making a total of $2,190,-750 (R. 6-7). In the alternative, "in the event of an adversary contest," they asked that the Government be required to account on the basis of having the interest compounded annually, commencing July 1, 1904, making a total award of $9,500,000 (R. 7).

The United States moved to dismiss the petition on the grounds (a) that "The Loyal Band or Group of Creek Indians, and the Loyal Creek Claimants' Committee" are not a "tribe, band, or other identifiable group of American Indians" within the meaning of Section 2 of the Indian Claims Commission Act, *supra,* pp. 5-6, and (b) that the claim was not a common claim of a group but an aggregate of individual claims (R. 7-20). The Indian Claims Commission in an opinion of May 6, 1949, concluded that it had jurisdiction and accordingly denied the motion (R. 21-29).

Thereafter the Government on June 14, 1949, filed its answer raising anew, among other defenses, the issues as to the jurisdiction of the Indian

Claims Commission to consider this type of claim (R. 30-34). On the merits, the Indian Claims Commission decided in favor of the United States, Commissioner Witt dissenting, and dismissed the petition on July 14, 1950 (R. 102-116). The grounds for decision were (a) that the only final action of the Senate in determining the award was at the time it fixed the sum of $600,000, (b) that, in any event, the claimants by accepting the award were, and now are, estopped to deny its finality, and (c) that "the Government cannot be charged with unfair or dishonorable dealings in doing what the Creek Nation agreed it could do, namely, pay a gratuity which had been fixed by the Senate, as required by the agreement" (R. 102-110).

The Court of Claims reversed the Commission and awarded the loyal Creeks $600,000.[2] The ground for the decision was that "As to the Senate's thinking on the question, when it made its determination of $1,200,000, we have no doubt that it intended that to be its award, pursuant to the agreement" (R. 123). The court held that the releases were not binding because the payment of a portion of a liquidated sum "which is clearly owed" does not discharge the whole debt (R. 124). Chief Judge Jones and Judge Littleton concurred separately on the ground that the claims should be paid on the basis of fair and honorable dealings, a ground au-

[2] The court stated its desire to award interest for the forty-seven years, but reluctantly did not do so because decisions of this Court plainly forbade it.

thorized by the Indian Claims Commission Act (R. 125-126).

REASONS FOR GRANTING THE WRIT

1. Section 2 of the Indian Claims Commission Act, *supra,* p. 5, authorizes claims to be heard only on behalf "of any Indian tribe, band, or other identifiable group of American Indians." That is an express limitation on jurisdiction which bars the respondents here from prosecuting this suit.

Indians belong to any number of identifiable groups. Among others, they are members of ethnological, political, religious, occupational, fraternal and civic groups. The phrase "identifiable group" in the Act becomes so broad as to lose all significance if the rule *ejusdem generis* is not applied so as to restrict it to a political unit as a "tribe" or "band." The Act itself implies that limitation in Section 13(a), *supra,* p. 6, by qualifying the phrase with the words "existing as distinct entities, residing within the territorial limits of the United States or Alaska."

Sponsors of the legislation before Congress made it clear that the proposed law "only relates to tribal claims or claims of bands. * * * It would not cover individual claims of Indians." Hearings of the Committee on Indian Affairs, House of Representatives, on H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess., p. 77. The bill was not intended to "throw you over to the people who have made themselves into a group, a lot of individual claimants

who had formed themselves into a group merely in order to get into this court." Hearings of the Senate Committee on Indian Affairs on S. 2731, 74th Cong., 1st Sess., p. 40.

The loyal Creek veterans and refugees of the Civil War and their descendants are in fact and, contrary to the holding of the Indian Claims Commission, have always been treated by the judicial, executive, and legislative branches of the Government merely as individual members of the Creek Nation without independent group existence or power. In 1884, the Court of Claims refused an action by the original 1,523 loyal Creek Indians to recover a sum in addition to that allowed by the treaty of 1866 on the ground that, as citizens of the Creek Nation, they could not act independently of the Creek Nation and the latter had accepted the treaty sum in full settlement of all claims arising out of the Civil War. *Connor, et al.* v. *United States,* 19 C. Cls. 675, 679. In April 1903, the Attorney General ruled that the $600,000 awarded by the Act of March 3, 1903, was to be accepted, not by the loyal Creek claimants, but by the Creek Nation, "the nation being the natural representative of such a claim by its citizens." 24 Op. A.G. 623, 633-634.[3] Congress has never acknowledged

[3] If, as held by the Attorney General in 1903, the acceptance of that sum paid on the claims of individuals had to be accepted by their natural representative, the Creek Nation, it follows that, if any further claim could exist on the same subject matter as a group claim, the claimant must be the same entity or group with which Congress previously dealt and which accepted the previous payment on the same obligation.

the loyal Creeks as a group. On the contrary, it treated with "All claims of whatsoever nature, including the 'Loyal Creek claim' * * *, which the tribe or any individual thereof may have against the United States" in the Act of March 1, 1901, and with "the so-called 'loyal Creek claims'" in the Act of March 3, 1903.

The individuality of the claims has been emphasized elsewhere. In the treaty of June 14, 1866, providing for payment of $100,000 from tribal funds, it was stated that the sum was to be paid "in proportion to their respective losses." In the 1903 Act, Congress provided that payment of the $600,000 "shall be made in proportion to the awards as set out in said list." On June 14, 1904, the Attorney General stated that the latter Act "recognizes, in each of the Creek Indians whose names appear on the Hazen and Field roll, a valid claim against the United States" and that the appropriated sum "is an individual asset of a limited number of the tribesmen." 25 Op. A. G. 163, 166.

The situation here is similar to that in *Blackfeather* v. *United States,* 190 U.S. 368, where suit was brought by the principal chief of the tribe for depredations committed by white citizens upon the properties of various Indians. The Court of Claims sustained a demurrer (37 C. Cls. 233) and this Court affirmed (190 U. S. at 378) on the ground that the claims referred to in the jurisdictional act "were the claims of the Shawnee tribe or band of Indians, and not the personal claims of the

individual Indians belonging to said tribe or band of Shawnees." Cf. *United States* v. *Blackfeather*, 155 U. S. 180, 195. The Indian Claims Commission distinguished that case from the instant case on the ground that there the suit was "a common action for individual and independent claims" while here "the claim is for the enforcement of an alleged obligation in which the Indians, or their heirs, who composed the Loyal Creeks, have a common interest in the subject matter" (R. 28). But the referenced "common interest in the subject matter" is not a ground for distinction. The circumstance here that the Senate dealt with these claims together because of their common origin and voted $600,000 in a single sum, rather than compute and itemize each award, did not create a common interest in the subject matter in the sense of a common claim. The sum was arrived at on the basis of a list of individual losses (R. 94-98) and payment was to be determined by that list and made to individuals for specific and distinct property lost to each of them. Each individual was to receive a fixed, easily calculable sum. If any claims exist, they are for those sums individually and independently.

This Court has defined a tribe or a band of Indians as a group "united in a community under one leadership or government" with "independence of action, continuity of existence, a common leadership and concert of action." *Montoya* v. *United States*, 180 U.S. 261, 266. Reason requires that

Congress intended the "other identifiable group", as used in the Indian Claims Commission Act, to possess characteristics of that nature as a basis for unity rather than the single, tenuous bond of having individual claims arising from a common event. It is putting effect before cause to recognize the existence of a group by reason of the existence of related claims. On such a basis, any two or more Indians asserting claims which could be joined in a single action would constitute an identiafiable group.

Given a group, the Act creates a right for it to sue on its claims; but, given claims, the Act does not create a group entitled to sue. The sole basis here for a group is the existence of claims. The loyal Creeks have never acted in concert except to secure further allowances of their claims. Their loyalty during the Civil War was not group action. They have never had a political organization apart from that of the Creek Nation. They have never been a communal group. They have never been recognized by the United States as a separate entity, political or otherwise. Their present association is purely one of convenience formed apparently to collect an alleged claim against the United States. In every other respect, the loyal Creeks occupy the same positions as other members of the Creek Nation. Their claim is an aggregate of distinct, individual claims. From these circumstances, it is evident that the association of

the respondents does not constitute them a "tribe, band or other identifiable group" *existing as a distinct entity,* with a common claim, entitled to invoke jurisdiction for this action.[4]

2. By the Act of 1903, pursuant to the 1901 Agreement, there was "awarded as a final determination" of the so-called "loyal Creek claims" $600,000, and that amount was appropriated to be disbursed by the Secretary of the Treasury on condition that acceptance should be "in full payment and satisfaction of all claim and demand." The intent to dispose conclusively of these claims could not be more clearly manifested. The reasoning of the Court of Claims resulting in a frustration of that intent and an award of an additional $600,000 is demonstrably fallacious.

By the Act of March 1, 1901, the Senate was to make the determination as to the amount, if any, to be given the loyal Creek Indians. The Act did not prescribe the procedure to be followed by the Senate in making that determination. Thus, the Senate was the sole judge of the procedure to be adopted. It might have proceeded by simple resolution whereby it acts alone and its action alone is final when signed by the Secretary of the Senate.

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[4] While passed upon by the Indian Claims Commission, this question was not discussed in the opinion of the Court of Claims upon appeal, undoubtedly because it had not been urged as an alternative ground for affirmance of the judgment. The record fully discloses the facts and the arguments upon this issue and since the question is jurisdictional it is, we believe, properly presented for review by this Court.

McKee, *Manual of Congressional Practice,* p. 125. It did not do this. It elected, as it could, to act through a bill, which for finality required concurrence by the House of Representatives and the signature of the President. U. S. Const., Art 1, Sec. 7; McKee, *Manual of Congressional Practice,* pp. 161-162. Under the latter procedure, no intermediate step in the legislative process is final or of any force whatsoever. The decision of the Court of Claims ascribes to a bill the characteristics of a resolution and finds finality where none exists under congressional procedure prescribed by the Constitution. The Court of Claims did not have the power so to change the legislative process.

The assertion by the Court of Claims that "the Senate's thinking on the question" was that its first vote for $1,200,000 was the final award pursuant to the Act of 1901 is totally without basis. The remarks of Senator Quarles prior to the first vote stating that the Senate was then sitting alone as a court of arbitration (heavily emphasized by the Court of Claims) cannot override the inevitable meaning of the procedure followed by the Senate. Under the procedure knowingly adopted by the Senate, its intention can only be taken from the legislative procedure it actually followed. Its final action, which became the Act of 1903, unequivocally "awarded, as a final determination" $600,000, and no more, "in full payment and satisfaction" of the claims expressly pursuant to the 1901 agreement

with the Creek Nation. That action of the Senate leaves nothing open for construction.[5]

3. Assuming *arguendo* that the initial action of the Senate awarding $1,200,000 constituted its final determination, the fact remains that both the Creek Nation and the individual claimants thereafter accepted $600,000 in full and complete satisfaction of the claims and released the Government from any further such claims (R. 83-84, 88a). The Court of Claims held that the releases were not binding because not supported by consideration. But the rule requiring consideration for releases between individuals has no application in suits by Indians against the United States because the relation between them is different from that existing between individuals. *Klamath Indians* v. *United States,* 296 U. S. 244, 254-255. Moreover, the rule is not appropriate to a gratuity where consideration has never been a factor. The award by the Senate was no more than an expression of willingness to *give* the Indians $1,200,000 because of the losses they suffered as a result of their loyalty. Finally, if the Senate created a legal indebtedness, it created one which could be released for a lesser sum, because

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[5] The concurring opinion of Chief Judge Jones and Judge Littleton does not supply a valid basis for recovery here. As was well understood from the outset of the negotiations with the Indians, there was no legal or moral obligation on the part of the United States to pay anything. S. Rept. 3088, 57th Cong., 2d sess., p. 5; *Grant* v. *United States,* 7 Wall. 331, 337; *Turner* v. *United States,* 248 U.S. 354; *Connor, et al.* v. *United States,* 19 C. Cls. 675 (1884). An award based on a gratuity cannot correctly be held unfair and dishonorable.

the creator of it, as a part of the same transaction, also created by agreement with the House the condition that a release be executed upon payment of $600,000.

It is incongruous to give meaning to the Senate's initial vote while giving no meaning and intent to the requirement in the final measure for a full release for a lesser sum. It is extreme to say that the requirement of a release was an idle act on the part of both Houses of Congress and the President. It is equally extreme to say that the President in approving the resolution of the Creek Nation, acknowledging full settlement and releasing the Government, performed a meaningless act. The payment of the $600,000 was sufficient consideration for the release. The Indians "may not avoid the release given in accordance with the Act upon the ground that the payment was too small. That would enable them to question the laws of Congress in fields where, because of the relationship referred to, they are supreme." *Klamath Indians* v. *United States,* 296 U.S. 244, 254-255.

4. Suits instituted and to be instituted under the Indian Claims Commission Act by Indians who claim to constitute "a tribe, band, or other identifiable group" are numerous and involve large sums of money.[6] It is important that the scope of

[6] See Appendix A to the Government's brief in *United States* v. *Alcea Band of Tillamooks, et al.*, No. 281, O.T., 1950. In addition to those listed as having already been filed, over 100 contracts between Indian groups and attorneys for suits under that statute have been approved by the Department of the

the Act in that particular be authoritatively defined.

The question as to the validity of releases given by Indians is far-reaching both under the Indian Claims Commission Act and outside of it. Indians have given releases to the Government in settlement of their claims in a great many instances from the beginning of their dealings with the Government. The decision of the Court of Claims makes meaningless all of those given where the obligation had been reduced to a sum certain before the release for a lesser sum. It casts troublesome doubt on all the rest because it applies the doctrine of consideration to a relationship where it was heretofore thought to be inapposite. In the latter respect, at least, the decision seems in conflict with *Klamath Indians* v. *United States,* 296 U. S. 244.

In the aggregate the outcome of Indian litigation has a substantial impact on the fiscal operation of the Government. The cases are sufficiently related in fact and in spirit so that an erroneous decision in one is carried over to the next. It is thus important in this early case under the Indian Claims Commission Act that the conflict of viewpoints between the Indian Claims Commission and the Court of Claims be resolved.

Interior. Presumably, most of these and subsequent ones will proceed to judgment. As here, the Department of the Interior approves such contracts without conceding that the "group" comes within the Act (R. 64).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

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